**BOND M & E (KL) SDN BHD**

**v.**

**SOUTHERN CABLE SDN BHD & ANOR**

HIGH COURT MALAYA, KUALA LUMPUR
MOHAMAD ARIFF YUSOF J
[ORIGINATING SUMMONS NO: D-24NCC-19-2011]
11 APRIL 2011

***DEBTORS:*** *Assignment - Assignment of debts - Notice - Notice of assignment - Second claimant assigned applicant to pay debt to first claimant - Applicant received notice but did not expressly agree - Applicant continued making direct payment to second claimant - First claimant demanded full payment - Interpleader summons - Which party to make payment to*

***CONTRACT:*** *Assignment - Assignment of debts - Whether there was absolute assignment put in writing - Necessary ingredients of an absolute assignment effectual in law - Whether satisfied*

The first claimant ('Southern Cable') was responsible for the supply of cables to the second claimant ('Enflex') which, in turn, was the direct supplier of cables of the applicant ('Bond'), a mechanical and electrical contractor. The sum due for the supply of cables from Enflex to Bond was RM300,713.05 ('the sum due') in total and this amount was the amount to be paid by Enflex to Southern Cable, as its supplier. Bond was informed that Enflex was struggling financially and could not pay its debts. *Via* a notice of assignment ('the notice'), it then assigned Bond to pay the sum due to Southern Cable. Although Bond received the notice, it did not expressly agree nor acknowledged it. In challenging the validity of the notice, Bond asserted that it was issued when Enflex was insolvent and the cable supplied did not derive from Enflex only but also other suppliers. With the knowledge that there was dispute amongst the directors of Enflex regarding the issuance of the notice, Bond chose to make direct payment to Enflex. Between November and December 2010, Bond paid a sum of RM190,813.05 to Enflex in the hope that the payment would then be forwarded to Southern Cable. As it had not received the sum due, Southern Cable demanded for the full payment under the assignment. Consequently, Bond instituted the present interpleader summons in order to determine which party was entitled to receive the payment.

**Held (debt due from Bond to Southern Cable):**

**(1)** Enflex cannot provide an express notice of assignment and at the same time inform Bond that there was a dispute among the directors over it as the dispute was a matter within internal management. This argument bred commercial uncertainty and brought to nought what was set on paper amongst commercial men. On the issue that Enflex was insolvent, there was evidence supporting this contention. (paras 11-12)

**(2)** The issue at hand was the legal efficacy of the assignment, not the source of supply of cables. The source of supply of cables was wholly irrelevant. (para 11)

**(3)** When an absolute assignment was put in writing and given in the name of the assignor while an express notice was also given in writing to the debtor, it became effectual in law to transfer the legal right to the debt from the date of the notice together with all the legal and other remedies to enforce that right. The necessary ingredients of an absolute assignment effectual in law were satisfied in the present application. There was an absolute assignment in writing of the debt from Enflex to Southern Cable. The express notice was given to Bond in writing. Bond cannot ignore this assignment of the legal right to the debt and choose to pay to the assignor and expect the assignor to pay the assignee. (paras 16-17)

**Case(s) referred to:**

*Khaw Poh Chhuan v. Ng Gaik Peng (P) & Yap Wan Chuan & 9 Ors [1996] 2 CLJ 185 SC* ***(refd)***

*Hup Cheong Motor Co v. Jonathan Saong Mamat & Anor [1992] 3 CLJ 1596; [1992] 2 CLJ (Rep) 544 HC* ***(refd)***

*VPN Marketing (M) Sdn Bhd v. Datuk Saravanan Murugan & Anor [2010] 1 LNS 1200 HC* ***(refd)***

**Legislation referred to:**

Civil Law Act 1956, s. 4(3)

*For the applicant - Wong Wan Theng; M/s HL Lee & Co*
*For the 1st claimant - Raymond Thong Fook Choon; M/s TG Lee & Assocs*

*Reported by Najib Thamby*

## JUDGMENT

**Mohamad Ariff Yusof J:**

**[1]** This is an application by Interpleader Summons filed by Bond M & E (KL) Sdn Bhd ("Bond") for this court to determine the right to receive the sum of RM300,713.05 owing from Bond. The two Claimants are (1) Southern Cable Sdn Bhd ("Southern Cable") and (2) Enflex Automation Sdn Bhd ("Enflex Automation").

### The Issue

**[2]** This issue of which party is entitled to receive the payment from Bond arises from a notice of assignment of debts amounting to RM300,713.05, dated 4 October 2010 issued by Enflex Automation to Bond, and a corresponding agreement dated the same day entered into between Enflex Automation (as Settlor), Enflex Dynamics Sdn Berhad ("Enflex Dynamics") and Southern Cable (as Creditor). See exhs. "CCL1" and "AT1" to the further affidavit in support (encl. 3) and the affidavit in reply (encl. 4) respectively.

### Summary Of This Court's Decision

**[3]** I have provided an oral decision to the parties earlier as follows:

> The facts establish a good and valid assignment of the debt owing to Enflex Automation by Bond consistent with the requirements of section 4(3) of the Civil Law Act. Enflex Automation as Assignor cannot then claim payment of the debt already expressly assigned by it to Southern Cable. To allow it to, do so will flout all established principles and will be unconscionable. The assignment in this case is absolute in terms and expressly mentions that it cannot be rescinded except by the Assignee, namely Southern Cable.
>
> By the same token, notice was expressly given to Bond of the assignment. With the receipt of the notice, the assignment is perfected in law such that Bond cannot now maintain the position it need not pay to Southern Cable the sum it has paid to Enflex Automation. It remains bound by the assignment of which it has

notice. Bond can of course recover the sum already paid from Enflex Automation if Enflex Automation should choose not to remit this part of the assigned sum to Southern Cable.

The short point is an Assignor cannot take it upon itself to resile from a perfected assignment. It will be unconscionable for it to do so.

The sum of RM300,713.05 being the debt originally due from Bond to Enflex Automation but absolutely assigned to Southern Cable, shall be held due from Bond to Southern Cable.

On the issue of costs, given the conduct of Enflex Automation, it will be proper for this court to order that Enflex Automation should bear the costs of both the Applicant and the 1st Claimant, i.e. Bond and Southern Cable.

## Background Facts

**[4]** The facts of this dispute, as outlined in the affidavit in support (encl. 2), are fairly brief. Bond is a mechanical and electrical contractor which obtains its supply of cables directly from Enflex Automation. Enflex Automation therefore is a supplier of the cables to Bond, and has supplied this cables to Bond for which the sum of RM300,713.05 is acknowledged as the sum due from Bond to Enflex Automation. Southern Cable is one of the suppliers of cables to Enflex Automation. Enflex Automation therefore has to pay Southern Cable.

**[5]** As far as Bond is concerned, the sum of RM300,713.04 is acknowledged as the sum due.

**[6]** Sometime in September 2010, a Director of Enflex Automation (Macy Tean) informed Bond that Enfex Automation was in financial difficulty and could not pay its debts to its debtors. Arising from this, Enflex Automation assigned the debt owing from Bond to Enflex Automation to Southern Cable. The Notice of Assignment, earlier referred to, was then served on Bond.

**[7]** Bond now takes the position that it has not expressly agreed or acknowledged that notice of assignment. It is however not disputed the notice of assignment was received by Bond.

## The Terms Of The Notice Of Assignment

**[8]** I reproduce the relevant parts of the assignment below:

Date: 4.10.2010

To: Bond M & E (KL) Sdn Bhd

Dear Sirs,

**Re: Notice of Assignment of debts amounting to RM300,713.05**

We know from our records you are indebted to us the sum of Ringgit Malaysia (RM300,713.05) which are due and payable as at the date hereof (hereinafter referred to as the "Debt").

We hereby give you notice that we have assigned all our rights, title and interest in and to the debt to Southern Cable Sdn Bhd ... (Hereinafter referred to as the "Assignee") absolutely and not by way of charge only.

You are hereby directed to pay the debt to the Assignee or to such other person or persons as the Assignee may from time to time direct.

Please also be advised that the assignment cannot be cancelled without the prior written consent from the Assignee.

We shall be pleased if your goodselves could kindly acknowledge receipt of this Notice of Assignment as indicated below.

...

**[9]** Bond did not expressly acknowledge receipt by signing on the acknowledgement of receipt section in the letter of assignment.

## Payment By Bond To Enflex Automation After Notice Of Assignment

**[10]** According to Bond, the Director of Enflex Automation, referred to earlier, also informed if there was some dispute amongst the Directors of Enflex Automation on the issue of the notice of assignment. Bond, in this situation, decided to pay directly to Enflex Automation and challenge the validity of the notice of assignment on the following additional grounds:

(a) The notice of Assignment was issued on 4 October 2010 at the time when Enflex Automation was insolvent; and

(b) The cable supplied to Bond by Enflex Automation came from various other suppliers apart from Enflex Automation.

**[11]** I find these grounds now being raised by Bond somewhat odd. To start with, there is no evidence before this court that Enflex Automation is insolvent. Indeed, the company search introduced as exh. "AT2" in the affidavit in reply of Southern Cable (encl. 4) shows the contrary. Some attempt is made to reply to this in the affidavit in reply of bond (encl. 5), but the details supplied are in reference to Enflex Dynamics, and not Enflex Automation. As for the ground on the source of supply of the cables, this seems to be wholly irrelevant to the matter at hand. What is an issue is the legal efficacy of the assignment of which notice has been expressly given by Enflex Automation to Bond, not the source of supply of cables.

**[12]** In regard to the dispute among the directors, this is a matter of internal management. Enflex Automation cannot blow hot and cold; it cannot provide an express notice of assignment, and at the same time the very same director informs Bond that there is some dispute among the directors on it. This sort of argument breeds commercial uncertainty and brings to nought what is set on paper amongst commercial men.

**[13]** Arising from the position it took, Bond then makes payment in the months of November and December 2010 the total sum of RM190,813.05 to Enflex Automation. It appears that this was done with the intention that Enflex Automation will then forward the payment to Southern Cable. See para. 13 of encl. 2:

> Walau bagaimanapun, Pihak Menuntut Kedua tidak menyalurkan bayaran tersebut kepada Pihak Menuntut Pertama.

**[14]** Southern Cable's solicitors have now demanded against Bond for the full payment under the assignment. Hence, Bond institutes this Interpleader Summons.

## The Law

**[15]** The law on assignments is adequately covered by the relevant statutory provision, that is, s. 4(3) of the Civil Law Act 1956, reading in its relevant parts:

> (3) Any absolute assignment, by writing, under the hand of the Assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the Debtor, ... shall be,

> and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the rights of the Assignee ..., to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the Assignor.

**[16]** It is plain from the statutory formula that if an assignment is absolute and in writing and given in the name of the Assignor, and express notice in writing is given to the debtor, that absolute assignment is effectual in law to transfer the legal right to the debt from the date of the notice together with all legal and other remedies to enforce that right. The term "absolute" is used to exclude any assignment which purports to be by way of a charge only. There is an exception provided by statute, and this is in relation to "equities which would have been entitled to priority over the right of the assignee under the law". The issue of priority equities is not before the court, nor has it been argued in any form, and as such it is not necessary to deal with it.

**[17]** On the facts of this present application, all the necessary ingredients of an absolute assignment effectual in law are satisfied. There is an absolute assignment in writing of the debt from Enflex Automation to Southern Cable, of which express notice in writing has been given to Bond. As such, this absolute assignment is effectual in law to transfer the legal right to the debt to Southern Cable. Bond cannot, after express notice is given, ignore this assignment of the legal right to the debt and choose to pay to the Assignor, in the hope that the assignor with pay the assignee. Again, a breach of this clear legal position can lead to commercial uncertainty and undermine the legal effectiveness of assignments of choses in action in general. The disruption to commercial transactions is not hard to imagine. To take one instance, project financing is provided to a party and the repayment is to be secured by an assignment of proceeds from the project. The legal structure will be founded on an absolute assignment of a chose in action. If the creditor to whom express notice has been given of the assignment, can still choose which party to pay for some reason or other which it itself thinks valid, the entire legal structure will be placed in jeopardy. The same argument should obtain on the relatively simple set of facts in the present dispute, for the principle of law should remain the same.

**[18]** It suffices for present purposes to refer to some of the case authorities on the issue:

(a) *Khaw Poh Chhuan v. Ng Gaik Peng & Yap Wan Chuan & Ors* [1996] 2 CLJ 185.

> Since the assignment is absolute and in writing, and since Notice of the Assignment had been given to the Debtors, there was due compliance with s. 4(3) of the Civil Law Act. Be that as it may, compliance with s. 4(3) is not a prerequisite to the validity of an assignment, which is to be determined in the usual way.
>
> Even without complying with s. 4(3), ie, without Notice of Assignment to such Debtors, the assignment would have been valid in equity against the Assignor. Section 4(3) has not altered the law of assignment but merely made it easier for the Assignee in one aspect, in that the Assignee can sue in his own name without sometimes having to borrow the name of the Assignor, or to join the Assignor as co-defendant if the Assignor is uncooperative.

(b) *Hup Cheong Motor Co v. Jonathan Saong Mamat & Anor* [1992] 3 CLJ 1596; [1992] 2 CLJ (Rep) 544.

> As the assignment is for valuable consideration, it is therefore a good assignment ... In this respect para. 1371 of *Halsbury Laws of England* (4th edn), Vol. 16 says:
>
> An assignment for valuable consideration of property to be afterwards acquired by the Assignor, while it operates as a covenant to assign the property when acquired, and the beneficial interests passes as soon as the property is acquired by the Assignor, does not take effect solely on contract, but confers an immediate interest on the Assignee ...

(c) *VPN Marketing (M) Sdn Bhd v. Datuk Saravanan Murugan & Anor* [2010] 1 LNS 1200.

> The law is settled that three conditions have to be fulfilled to effect a legal assignment under s. 4(3) of the Civil Law Act 1956, namely;
>
> (a) That the assignment must be in writing under the hand of the Assignor;
>
> (b) That the assignment must be absolute and not by way of charge only, and

(c) That express notice in writing must have been given to the person liable to the Assignor under the assigned chose in action.

If the assignment fulfilled all the above conditions, it would transfer absolutely chose in action and the right to sue upon the invoices to the Assignee in his/her name. As to the first two conditions, the Federal Court in *UMW Industries (1985) Sdn Bhd v. Ah Fook* [1996] 1 CLJ 379; [1996] 1 MLJ 365 recognised that no particular form is necessary but it must be absolute, ie, one that purports to pass the entire interest of the Assignor in the chose in action. Neither is it a requirement that the notice given to the Debtor should necessarily have been given by the Assignee. What is essential is that, there should be a document amounting to an absolute assignment in writing under the hand of the Assignor. It would appear that where the parties to the assignment have exchanged more than 1 document, the Court is entitled to look at all the documents to ascertain the existence of the assignment in writing under the hand of the Assignor (see *Khaw Poh Chuan v. Ng Gaik Peng & Ors* [1996] 2 CLJ 185) ... (per Varghese George J)

## Conclusion

**[19]** Based on the above reasons, this court thus orders that the sum of RM300,713.05 being the debt originally due from Bond to Enflex Automation but absolutely assigned to Southern Cable, shall be held, due from Bond to Southern Cable.

**[20]** As for costs, given the conduct of Enflex Automation, this court orders that Enfex Automation should bear the costs of both the applicant and the 1st claimant, ie, Bond and Southern Cable.